No. 2 Misc.

JUN 24 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, Respondent.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

PETITION FOR REHEARING

Thomas J. Kenan
GEORGE, KENAN, ROBERTSON AND LINDSEY
1366 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

Of Counsel:
George and Kenan

June 24, 1970

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 2 Misc.

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, Respondent.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus, entered on June 1, 1970, and (2) granting the Motion. As grounds for this petition, petitioner states the following:

1. *The Court's June 1, 1970 Opinion is not directed to the issues raised in the motion for leave to file.*

The petition before the Court, attached to petitioner's motion for leave to file, challenges an order that issued from the Judicial Council of the Tenth Circuit, respondent

herein, on December 13, 1965. While the Judicial Council on February 4, 1966 superseded the challenged order of December 13, 1965 and later issued additional orders modifying its February 4, 1966 order, the original order of December 13, 1965 is the only order challenged in the Motion for Leave to File and the only order before the Court for review.

The record in this proceeding is voluminous. A great portion of it is dedicated to an interpretation of the various actions of the Judicial Council subsequent to its entry of the original order of December 13, 1965 and subsequent to the filing of this action. While petitioner may have repeatedly asserted that the Judicial Council was continuing to act in violation of his rights and inconsistent with law, the significance of all filings in this proceeding subsequent to petitioner's original motion was the establishment of the melancholy fact that the subsequent actions of the Judicial Council were wholly an attempt to deceive the Court by glossing over its initial conduct with actions that might have some better basis in law or fact. Unfortunately, the opinion of the Court in denying petitioner's motion and the Concurring Opinion of Mr. Justice Harlan both placed emphasis upon the superseding of the challenged order of the Judicial Council and the subsequent actions of the Judicial Council as if these actions somehow altered the nature of this proceeding. It is submitted that none of the subsequent actions of the Judicial Council have any bearing on this case other than the light they might shed upon any ambiguities contained in the initial reasons stated by the Judicial Council as justifying the issuance of its Order of December 13, 1965. Since these subsequent actions clearly show that the Judicial Council twice altered its announced grounds for taking the original action against the petitioner, it is our contention that the record itself reveals, through the Judicial Council's inconsistencies, that the subsequent actions of the Judicial Council are to be accorded no weight in this proceeding.

The second order of the Judicial Council, that of February 4, 1966, and subsequent orders and actions have not in any way impaired the reviewability of the motion for leave to file, which challenges the original December 13, 1965 order of the Judicial Council, unless the Court is overruling a well established rule of law concerning mootness of issues, which rule was only recently unanimously reaffirmed by this Court on November 25, 1968 in *United States v. Concentrated,* 393 U.S. 199, in which case the Court stated:

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the Courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' *United States v. W. T. Grant Co.,* 345 U.S. 629."

Petitioner assumes the Court did not presume to overrule this well established rule of law. Yet, the Opinion of the Court, in denying petitioner's motion, stated:

> "In essence petitioner challenges *all orders* of the Judicial Council relating to assignment of cases in the Western District of Oklahoma as fixing conditions on the exercise of his constitutional powers as a judge." (emphasis added).

2. *The Opinion of the Court is based upon false assumptions of fact.*

As stated above, the Opinion of the Court and the Concurring Opinion of Mr. Justice Harlan place great emphasis upon the actions of the Judicial Council subsequent to its initial order and upon actions of the district judges of petitioner's court in the assignment of cases. Yet, unless the Court is blind to the shotgun wedding nature of petitioner's participation in these later events and chooses to conclude that he willingly acquiesced in these subsequent actions, the reliance by the Court upon these subsequent events amounts to its reliance upon facts foreign to the issues raised by petitioner's motion for leave to file. The Court should return its attention to a consideration of the facts that were actually before the Court.

The original order of the Judicial Council must be accepted at face value. The Court should carefully consider the announced reasons stated by the Judicial Council in such order as justifying its action in stripping the petitioner of all his judicial powers. *There is no mention in such order reciting a heavy caseload that petitioner was unable or unwilling to bear.* Yet, the later fabrication by the Judicial Council of this theory is the escape hole through which it slips. If this was the basis for the original December 13, 1965 order, why was it not so stated at that time?

Only a casual reading of the record in this proceeding reveals that the Judicial Council successively adopted three different positions to justify its action against petitioner:

(1) *Position No. One: the challenged order of December 13, 1965.* The Judicial Council referred to the "attitude and conduct of Judge Chandler" as they had particular regard to the business of his court. Reference was made to the fact that during the past four years Judge Chandler had been a party in both civil and criminal litigation and that one civil case was still pending. Reference was made to the fact that two proceedings had been brought in the U. S. Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation and that in one instance he was ordered to proceed no further and that the other proceeding was still pending. Finally, a statement was made that

> "from a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge the official duties of his office."

This order against Judge Chandler was issued in a manner shockingly inconsistent with the principles of due process of law.

(2) *Position No. Two: the January 13, 1966 Memorandum For The Respondent In Opposition To The Application For Stay.* This memorandum clearly departs from the challenged December 13, 1965 order of the Judicial Coun-

cil in that it advises the Court, through rather strong innuendo, that the true reason the Judicial Council had acted against Petitioner was that he was either insane or corrupt or some other horrible situation existed. The statement is made by Solicitor General Thurgood Marshall that he had personally examined materials in the files of the Judicial Council and of the Administrative Office of the United States Courts in Washington and that

> "without intimating any view of the ultimate merits, he deems it appropriate to state to the Court his conviction that the matter is one which warrants the most careful examination."

Solicitor General Marshall also stated that

> "Public confidence in the federal judiciary would inevitably be impaired if Judge Chandler were to preside over the District Court of the Western District while the question of his present unfitness to serve in that capacity is under consideration."

(3) Position No. Three: the March 17, 1966 Supplemental Memorandum For Respondent. In this document, the Judicial Council again changed its position and stated that it had been suppressing petitioner's judicial powers all along only in order to help him clean up a crowded docket, action superficially more compatible with the provisions of 28 U.S.C. 137 than with those of 28 U.S.C. 332.

Petitioner has always maintained that the Supplemental Memorandum for Respondent was crammed with poppycock and clearly revealed that the Judicial Council was not candidly dealing with the Court. Should any party before this Court, even a Judicial Council, that changes its position three times be accorded the general presumption of credibility due litigants?

The issue petitioner has been trying to present to the Court for its consideration for over four years is the legality of the initial December 13, 1965 order. Such issue has never been mooted. The announced reasons in the initial order for the action taken against petitioner are the only

reasons properly before this Court. Such order should be taken at face value due to the demonstrated lack of credibility of the Judicial Council in explaining its actions and due also to the fact that orders signed by circuit judges are supposedly well drafted and should be taken at face value anyway. The Court, in its Opinion and Concurring Opinion, did not address itself to the facts involved in this proceeding, which facts are wholly contained in the Petition for Writ and have never been challenged or refuted by the Judicial Council.

3. *The jurisdiction question.* Petitioner notes with regret that the Court approaches the jurisdiction question raised in this proceeding but turns away and alludes to the difficulty of the question as one of the reasons the Court should decline, in its discretion, to grant the extraordinary remedy of mandamus or prohibition. Petitioner appreciates the more careful consideration given this question by Mr. Justice Harlan in his Concurring Opinion and hopes the reasons set forth above will persuade him and others in the majority to recommend a rehearing of this proceeding due to the lack of legal significance of the Judicial Council's actions taken subsequent to the order of December 13, 1965.

There was no question of a lazy or inefficient judge with a large backlog of cases, as the Council tried to make it appear by its subsequent issuance of other Orders so suggesting.

The district judge had no backlog of cases. His docket was current. His cases were proceeding to final judgment with dispatch as they had been for the preceding 22 years.

The records of the court, available to all, show that the district judge disposed of an average of 201 Civil cases each fiscal year from his appointment in 1943 to June 30, 1966, six months after the Writ of Prohibition was entered, far more than any of the other judges of the court during any part of the 22 years. In addition he handled his proportionate share of the criminal cases and all of the time-consuming Bankruptcy Reorganization cases during the

years 1956 to 1965. Judge Chandler was Chief Judge during this same ten year period and also handled the administrative matters of the court, which is also quite time-consuming.

During the five years ending June 30, 1966, the court records show that, with only two judges sitting in fiscal year 1961, Judge Rizley disposed of 208 Civil and 112 Criminal cases and that Judge Chandler disposed of 219 Civil and 134 Criminal cases; that during the ensuing four years ending June 30, 1966 the average of cases disposed of was -

Judge Chandler	156 Civil	87 Criminal
Judge Rizley	102 Civil	51 Criminal
Judge Bohanon	80 Civil	115 Criminal
Judge Daugherty	86 Civil	98 Criminal

(Judges Bohanon and Daugherty, who are roving judges with headquarters in Oklahoma City, handled business in two other districts also. Photostatic copies of the complete statistics as reflected by the official records of the Court Clerk on file with the House Judiciary Committee are attached hereto. If the Administrative Office of the United States Courts had kept translatable statistics, its records would have also reflected these facts.)

The foregoing statistics show conclusively the lack of candor of the Judicial Council in its subsequent efforts to promote a "heavy caseload" justification for its December 13, 1965 order ("Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office;") and for its February 4, 1966 order, where the Council states on page 4 of the order:

> "2. The Council *is informed of* the present and past administration of the business within the Western District of Oklahoma as revealed *by the files and records of the Clerk of the Western District*, the reports and analysis of the same by the Office of the Administrator of the United States Courts, and by this Council's continuing review of the operations of that Court." (emphasis added).

Yet the Court, in its denial Opinion, dwelt upon the later orders entered by the Council, orders concocted in an effort to make it seem (contrary to the facts) that petitioner had too large a backlog of cases and shouldn't be assigned any more cases until his backlog was disposed of. This was a reliance upon matters not only foreign to this proceeding but matters deliberately contrived to mislead the Court.

In connection with the foregoing, the Court should be reminded that the Council *conceded* that its February 4, 1966 and July 12, 1967 orders "restoring" the district judge's powers *did not moot the question of the legality of the original Order* of December 13, 1965. *United States v. Concentrated,* 393 U.S. 199.

No wonder the Judicial Council did not justify, in its initial order, the stripping of Judge Chandler's powers for inattendance to judicial duties. Petitioner urges Mr. Justice Harlan and the others in the majority to disregard the caseload smokescreen laid down by the Judicial Council, to adopt Solicitor General Griswold's and Mr. Justice Harlan's handling of the jurisdiction question and grant a rehearing on the issues involved in this proceeding.

The Supreme Court had potential appellate jurisdiction by virtue of Sec. 1651 (a) of the Judicial Code over each of the 150 cases in which Judge Chandler was sitting but refused to exercise it in violation of the time-honored precept expressed by Chief Justice Marshall in 1821 in *Cohens v. Virginia,* 19 U.S. 264, 404, where he said

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. * * * With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason* to the constitution." [italics ours]

If the present judgment stands all United States District Judges serve at the whim and caprice of Judicial Councils, the Separation of Powers Concept is destroyed, the Constitution scrapped.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ attached to his motion for leave to file, petitioner prays that this Court grant rehearing of theorder of denial, vacate that order, grant the petition and review the December 13, 1965 order of the Judicial Council and issue the Writ sought by petitioner for so many years.

Respectfully submitted,

Thomas J. Kenan
Counsel for Petitioner

June 24, 1970

Certificate of Counsel

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(1).

Thomas J. Kenan
Counsel for Petitioner